IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.
Arbitration Application No.319 of 2004

Mahesh Gupta & anr. Applicants

Vs.

Jayesh Pandya & anr. Respondents

Mr.Ashok Gupta-applicant no.2 in person.
Mr.J.P.Sen i/b J.D'Silva for Resp.No.1.

CORAM: B.H.MARLAPALLE, J.

February 24, 2006.

P.C.

1. This application presented under Section 11 of the Arbitration and Conciliation Act, 1996 on or around 12/12/2004 prays as under:

(a) It be declared that His Lordship the Hon'ble Mr.Justice _____ (Retired) be appointed as the Sole Arbitrator to arbitrate the disputes between the Applicants and the Respondent No.1 herein.

(b) In the alternative any other fit and proper person be appointed as the Sole Arbitrator to arbitrate the disputes between the applicants and the Respondent No.1.

. It is obvious that in the first prayer the name of the learned Judge who retired has not been mentioned and, therefore, it is the alternative prayer for appointment of fit and proper person as the sole arbitrator that requires to be considered in this application. By the order dated 20/1/2006 passed by this Court the following three preliminary issues have been framed by consent of the parties:

(1) Whether the petitioner proves that there is an agreement of arbitration between the parties as alleged in the petition.

(2) What order if any.

(3) What order as to costs.

2. On 27th January 2006 the applicant no.2, party in person stated that in addition to the affidavit-in-reply filed on or about 15th February 2006 and the documents annexed thereto there was no further evidence to be led by him in support of the above preliminary issues and on 17/2/2006 the applicant no.2 sought time to file his written

arguments which he has presented today. It appears that the applicants are the Directors of M/s. Sukanya Holdings Pvt. Ltd., a company registered under the Companies Act, 1956 and the said company is a partner in a construction firm by name Hetali Construction Co. in which the present respondent no.1-Jayesh H. Pandya and his brother Mr.Deepak Pandya are the other two partners. Thereafter Civil Suit No.1991 of 2000 came to be filed by the present Respondent No.1 on 9/5/2000 before this Court and it was subsequently withdrawn. Civil Suit No.2812 of 2001 came to be filed on the Original Side of this Court by the Respondent No.1 against M/s. Sukanya Holdings Pvt.Ltd. and it is informed across the bar that the said suit came to be dismissed and presently an appeal is pending before this Court. The present application under Section 11 arises on the following averments made in para 3 of this application:

> "The Applicants state that the Respondent Mr. Jayesh H. Pandya has filed a suit bearing no.2812/01 in this Honourable Court against the company - Sukanya Holdings Private Limited in which the applicants were Directors and for seeking relief of setting aside the conveyance

> and accounts of the firm and other reliefs and the same is pending in this Hon'ble Court. During pendency of the suit conciliation proceedings took place and thereafter narrowed down disputes were referred for Arbitration." (Emphasis supplied).

It is thus clear that the arbitration agreement that is sought to be relied upon for this application has purportedly originated from the conciliation proceedings that had taken place between the parties and not from any agreement as such for any business venture or for any commercial matter for that purpose.

3. The applicant no.2 filed the affidavit-in-reply and prayed for the documents annexed thereto to be relied upon as the evidence by referring to the following observations made in para 38 in the majority view in the case of M/s.S.B.P. & Co. v. M/s. Patel Engineering Ltd. & anr. **[2005 (9) SCALE 1]**:

> "...For the purpose of taking a decision on these aspects, the Chief Justice can either

proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary...."

. The applicant no.2, therefore, contends that it was not necessary for him to stand in the witness box and prove the documents annexed to the affidavit-in-reply and they are required to be accepted as it is, by way of evidence.

3A. In Civil Suit No.2812 of 2001 the present applicants filed Arbitration Petition No.500 of 2001 under Section 8 of the Act, seeking for reference to arbitration of all the suit disputes and this application came to be dismissed by this Court on 18th September 2001 and prior thereto by an order dated 23/8/2001 this Court had appointed once again a Court Receiver for the assets and properties of the partnership firm viz. Hetali Construction Co. Civil Appeal No.1174 of 2002 challenging the order rejecting the arbitration petition and filed by the company of the applicants came to be dismissed by the Supreme Court on 14/4/2003. In the mean while the

applicants served notices under Section 11 of the Act on the company by name Hetali Estates and Properties Pvt. Ltd., which is a company owned and controlled by the family members of present respondent no.1 and this Court appointed Mr.Justice M.L. Pendse (Retd.) as the sole arbitrator between the parties viz. Gupta Brothers on the one hand and Hetali Estates and Properties Pvt. Ltd. on the other hand. During the course of arbitration proceedings on 11/8/2004 the learned Arbitrator had suggested the respective parties to resolve the disputes amicably with the assistance of their respective counsel and, therefore, it was reduced in writing between the parties on 12/8/2004 for conciliation. These settlement talks failed on 26th August 2004 as was concluded between the meeting of the counsel representing respective parties and, therefore, by his letter dated 30/8/2004 the respondent no.1 informed the applicants that the matter was finally concluded and there was no settlement possible. On 31/8/2004 the arbitration proceedings recommenced before Mr.Justice M.L. Pendse (Retd.). An objection was raised to the appearance of Mr.Jaisinghani in the arbitration proceedings on behalf of the respondent no.1 and the same was overruled. Finally on

27/10/2004 the learned Arbitrator passed an Award rejecting the entire claims of the claimants.

4. While framing the preliminary issues obviously the burden to prove the first issue has been cast on the applicants. The agreement providing for arbitration has been claimed to have originated for the first time from the letter dated 1/9/2004 purportedly received by the applicants from the respondent no.1 and the applicants claim to have received the said letter on fax from the respondent no.1. The said letter reads thus:

> ". Pursuant to your letter and points of difference informed by you, I would like to add following points before the Arbitration proceedings commences before Justice Dr. B.P. Saraf, Former Chief Justice of Jammu & Kashmir High Court.
>
> 1. Neither party would persuade the cases filed in civil - criminal courts, until such time the arbitration is over.
>
> 2. Neither party will be required to lead written evidence in support of their claim.
>
> 3. Arbitrator need not give reasoned award.
>
> 4. After the award is passed there will be no claim of either party against each other except the award passed by arbitrator in this proceeding.

5. Points of difference between the parties attached with this letter would be subject matter of arbitration.

6. Arbitration proceedings should be completed within a period of 4 months from this letter.

Yours truly,

Sd/-
(JAYESH PANDYA)"

On the basis of the said purported letter dated 1/9/2004 the applicants appear to have addressed a letter dated 13/9/2004 to Hon'ble Dr.Justice B.P. Saraf (Retd.) stating that the said letter refers to the arbitration proceedings to be commenced before him. In the said letter it was also sated that the Advocate for the present respondent had disputed having sent any fax to the applicants. This correspondence referred to above is the foundation of the so called agreement for arbitration in addition to the earlier letters exchanged between the parties. The respondent no.1 along with the affidavit-in-reply has placed on record the copies of the letters dated 30/8/2004 and 31/8/2004 addressed to the applicants and written by the learned Advocate on behalf of the respondent no.1. The first letter refers to the conciliation of disputes on the basis of the agreement between the learned counsel representing

the parties and appearing in arbitration proceedings before Hon'ble Mr.Justice M.L. Pendse (Retd.) and in the second letter there was no reference to any arbitration agreement. There is an E-mail letter claimed to have been sent by the present applicant no.2 to the respondent no.1 on or about 29/8/2004 and the respondent no.1, though his Advocate's letter dated 3rd September 2004, pointed out that when the peon sought to serve the letter dated 29/8/2004 in person it was noticed that there was a reference to the E-mail sent to the respondent no.1. Therefore, E-mail was opened and the same letter was noticed. The claim for arbitration set out therein was stoutly denied by the present Respondent No.1. This letter dated 29/8/2004 refers to the telephonic discussions wherein three names of retired Judges of this Court were suggested. The respondent no.1 has subsequently addressed the letters dated 3/9/2004, 4/9/2004 and 7/9/2004 to the applicant no.2 and clearly denied to have arrived at any agreement with the respondent no.1 regarding the appointment of arbitrator. The respondent no.1 appears to have also addressed a letter dated 7/9/2004 to Hon'ble Dr. Justice B.P. Saraf (Retd.) informing that the case made out by the applicant no.2 regarding the arbitration proceedings

was false and fabricated. Finally the applicant no.2 along with his affidavit dated 15/2/2005 has placed on record the so called office copy of a letter dated 1/9/2004 purportedly addressed by the respondent no.1 to the applicants. This document is not the original that the applicants received from respondent no.1 and it is an attested "xerox copy" and has been signed by a Notary. It was perhaps the attempt of the applicant no.2 to bring this on record by way of secondary evidence which cannot be accepted unless it is proved by leading evidence or the original is shown to the Court and attested copy is taken on record.

6. In the case of S.B.P. & Co. (Supra) it has been held, inter alia, that in an application under Section 11 of the Act this Court has to decide its own jurisdiction in the sense, whether the party making the motion has approached the right High Court, whether there is an arbitration agreement as defined in the Act and whether the person who has made a request before the Court is a party to such an agreement. In the instant case there is no agreement admitted providing for a clause of arbitration between the parties and in fact mere existence of

such an agreement is stoutly disputed by the respondent no.1 and the applicants have failed to prove the existence of such an agreement providing for an arbitration clause so as to settle the dispute including the purported recovery of Rs.7 crores. The onus to prove the agreement was on the applicants and they avoided to step in the witness box.

7. The above discussion thus clearly shows that there was no agreement for arbitration between the parties and this application appears to have been made on the basis of the purported agreement between the parties sought to be recorded by way of letters in reference to some telephonic conversations and any such claim made by the applicants has been consistently denied by the respondent no.1. The respondent no.2 has unnecessarily been dragged into this litigation and is perhaps a victim in silence. In the premises this application fails and the same is hereby rejected on the preliminary point that there is no agreement between the parties regarding reference to arbitration and, therefore, it cannot be entertained under Section 11 of the Act.

8. Now coming to the issue of costs, it must be

noted that before starting dictation of this order the applicant no.2 - party in person was given an offer to withdraw the application so as to avoid any costs and he stated in the Court that the application be decided on merits and he would not withdraw. In the written submissions placed before me today by the applicant no.2 in paras 3 and 4 the applicant has made some statements which are contrary to the record as reflects from the orders passed by this Court on 27/1/2006 and 17/2/2006. The application came up before this Court on number of occasions and the applicants claimed vehemently that there existed an agreement for reference to arbitration for settling the disputes between them and respondent no.1. In these circumstances, this is a fit case to award exemplary costs. Hence I direct the applicant no.2 to pay an amount of Rs.5,000/- by way of costs and the said amount shall be remitted to the Maharashtra State Legal Services Authority within a period of two weeks from today.

(B.H.MARLAPALLE,J.)